No. 78-990

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES T. COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENNETH S. GELLER
Assistant to the Solicitor General

JEROME M. FEIT
JOHN F. DEPUE
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

Cases—Continued — Page

Cases—Continued — Page

Miscellaneous—Continued Page

Miscellaneous—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-990

UNITED STATES OF AMERICA, PETITIONER

v.

CLIFFORD BAILEY, ET AL.

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES T. COGDELL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-91a, 100a-113a) are reported at 585 F.2d 1087 and 585 F.2d 1130.

JURISDICTION

The judgments of the court of appeals (Pet. App. 93a-94a, 114a-115a) were entered on July 12, 1978, and petitions for rehearing were denied on October 19, 1978 (Pet. App. 97a, 116a). On November 13, 1978, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 18, 1978. The petition was filed on that date and was granted on March 19, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal escape statute, 18 U.S.C. 751(a), requires proof of a defendant's specific intent to avoid "normal aspects of 'confinement' ".

2. Whether duress may be raised as a defense in an escape prosecution where the defendant (a) was not threatened with imminent harm from harsh prison conditions at the time of the escape and (b) remained in hiding following the escape.

STATUTE INVOLVED

18 U.S.C. 751(a) provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT

A. Respondents Bailey, *et al.*

Following a jury trial in the United States District Court for the District of Columbia, respondents Clifford Bailey, Ronald Cooley, and Ralph Walker were convicted of escaping from the custody of the Attorney General, in violation of 18 U.S.C. 751(a).[1] Each was sentenced to five years' imprisonment, to be served consecutively to sentences previously imposed.[2]

---

[1] Respondents were also charged with "prison breach," in violation of 22 D.C. Code 2601 (1973). The jury was instructed not to consider the charge under the D.C. Code if it found respondents guilty under the federal escape statute (App. 224; Tr. 804).

[2] Respondent Bailey was serving a 23-year sentence for bank robbery and attempted escape. Respondent Walker was serving a 15-year sentence for bank robbery. They had been brought from other federal prisons to the District of Columbia Jail pursuant to writs of habeas corpus ad testificandum issued by the Superior Court of the District of

The evidence showed that in the early morning hours of August 26, 1976, respondents Bailey, Cooley, and Walker escaped from the New Detention Center of the District of Columbia Jail by climbing through a low-level window of the Northeast-1 housing unit (App. 168; Tr. 562). They were apprehended by FBI agents in the District of Columbia on November 19, September 27, and December 13, 1976, respectively (App. 27-28; Tr. 65-66).

Respondents did not dispute at trial that they had fled from the jail without permission and had remained in hiding until their capture (App. 126-127, 169, 199-200; Tr. 418-419, 564, 721-722).[3] Rather, they claimed that their escape was excusable because of intolerable conditions at the jail. In support of this contention, respondents produced testimony from other jail inmates that fires were frequently set in the Northeast-1 cellblock, that correctional officers occasionally permitted these fires to burn, and that the resulting smoke often made breathing difficult for several hours (App. 33-35, 41-42, 55-56, 87-88,

---

Columbia. Respondent Cooley was serving a five-year sentence in the District of Columbia Jail following his conviction for unlawful possession of an unregistered firearm (Tr. 13-17, Gov't Exhs. 1, 1-A, 1-B, 2, 2-A, 3, 3-A, 4, 5, 6).

[3] Respondent Bailey initially testified that he could not remember the details of his escape, claiming that he had "just blacked out" (App. 165-166; Tr. 550). He later admitted that this testimony was not truthful and that he had knowingly escaped by going through an open window of a jail cell and climbing down some bed sheets hanging out of the window (App. 167-168; Tr. 555-562).

99-101, 107-108; Tr. 150-152, 161-163, 203-206, 354, 377-379, 390). The cellblock watch log established that fires had occurred on August 10, 11 and 16, 1976 (Deft. Exh. 1; App. 76-78; Tr. 310-312).[4] In addition, respondents elicited testimony that, several weeks prior to the escape, Bailey and Cooley were assaulted by guards armed with blackjacks, that corrections officials threatened Cooley as a result of his participation in setting cellblock fires, and that, sometime in early August, guards threatened to kill Bailey if he testified in the case in which he had been subpoenaed as a witness (App. 36-37, 91-95, 97-98, 101-103, 106-107, 109-110, 116-117, 142; Tr. 154, 360-370, 373-375, 380, 382, 388-389, 393, 404, 469).[5] Respondent Walker also sought to demonstrate that he had received inadequate medical treatment for an alleged epileptic condition (see, *e.g.*, App. 133-140, 182-183, 184-185, 187-188, 190-191; Tr. 438-458, 603-

---

[4] The Assistant Administrator of Operations at the jail acknowledged that the prisoners set small fires in the cellblocks. He maintained, however, that the officers on duty promptly extinguished the fires, that exhaust fans were utilized to clear the smoke from the air, and that medical attention was provided to anyone in need of it (App. 56, 58, 61; Tr. 204, 206, 209, 235-236). A corrections officer who had been stationed in Northeast-1 during the summer of 1976 also testified that the fires only lasted from five to seven minutes and that no officer ever permitted a fire to burn without acting to extinguish it (App. 87-92; Tr. 354-363).

[5] Corrections officers testified that none of the respondents had reported the alleged assaults and threats and denied that the incidents had ever taken place (App. 65-66, 67, 70-71, 87-88, 206, 209; Tr. 246, 255, 273, 354-355, 741, 752).

604, 625, 650-652, 678-680).[6] Finally, respondent Cooley testified that, on the morning of the escape, respondents Bailey and Walker had threatened to kill him if he did not join them. He admitted, however, that he left the jail by himself and did not know at the time whether Bailey and Walker had also escaped (App. 115-116, 118, 130-131; Tr. 402, 406, 424-425).

Respondents asserted that they took steps to communicate with police authorities following their escape. Respondent Cooley testified that his family attempted unsuccessfully to contact the authorities but that he refrained from doing so personally because he did not know whom to call and feared the repercussions of his escape (App. 118-120, 130-132; Tr. 407-408, 425-426). Respondent Bailey claimed that he "had the police called" and "had the jail officials called several times," although he did not identify the caller and admitted that he himself had not placed any calls or made any other effort to surrender (App. 168-169; Tr. 563-564). Respondent Walker testified that he "kept a constant rapport with the FBI" and tried to negotiate terms for his surrender (App. 194-195, 196-197; Tr. 710-711, 715-716). Walker contended that two days after his departure, he contacted the FBI agent in charge of the escape investigation, described the severity of the

[6] The evidence presented to support this claim was a medical history provided by respondent Walker himself. The claimed epileptic condition was not confirmed by medical examination. Despite this lack of substantiation, a jail physician had prescribed medication on a trial basis to control the alleged seizures (App. 133-134, 191; Tr. 438-439, 680-681).

conditions in the District of Columbia Jail, and sought to arrange for his detention in another facility (App. 196-198; Tr. 715-716, 718). Approximately 10 days later, he again allegedly telephoned the agent and sought to "work out the conditions for which I wanted to turn myself in." These conditions included an assurance that he would not be injured by the FBI and that he would not be returned to the District of Columbia Jail (App. 198; Tr. 719). According to respondent Walker, the agent promised that respondent would not be harmed but refused to agree that he would not be returned to the jail (App. 200; Tr. 722). A third alleged telephone call resulted in a similar impasse (App. 198-199; Tr. 719-720).[7]

At the close of the evidence, respondents requested an instruction on the defense of duress on the theory that their escape was compelled by the allegedly intolerable jail conditions (App. 17; see Pet. App. 18a n.32). The trial judge denied the request, holding that the defense was unavailable because respondents had failed to surrender to lawful authorities following their escapes (App. 201, 218-219; Tr. 725, 777). The judge instructed the jury as follows (App. 224-225; Tr. 806):

> You are instructed as a matter of law that conditions at the District of Columbia Jail or the new detention center, no matter how burdensome

[7] The FBI agents in charge of the escape investigation testified that they had never received or heard about any telephone calls from respondent Walker during the three months that he was a fugitive (App. 202-203; Tr. 730-733).

> or restrictive an individual inmate may find them to be, are not a defense to the charges in this case, nor justification for the commission of the offense of escape.

The court elaborated on this theme later in the charge (App. 225; Tr. 806-807):

> Now, the Court permitted the defendants to introduce this evidence and to seek to show that following their escape they turned themselves in, for if one, after escaping has turned himself in, then the defense of coercion or duress may be brought to the attention of the jury as a defense, but only if a defendant turns himself in.
>
> Now, there are recognized procedures for this to be done, and requisite protections insured by such action. As the Court heard the evidence, that was not done in this case. So the Court felt that it was incumbent upon the Court to assume responsibility for this aspect of the case, and to take it out of the case in effect. So, you are not to consider the defense of duress or coercion for the reasons stated. The defendants did not turn themselves in.

The judge also instructed the jury that escape is a "general intent" offense and that a general intent is only "the purpose to do something, the will to do the act. It means the act was done consciously and not inadvertently or accidentally" (App. 223-224; Tr. 803).

B. Respondent Cogdell

Respondent James Cogdell was indicted with the other respondents for the same escape at the District

of Columbia Jail. His case was severed, however, and he was tried before a separate jury. Respondent was convicted of escape, in violation of 18 U.S.C. 751(a), and was sentenced to five years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4205(b)(2) (Cogdell Tr. of July 6, 1977, at 31).

The evidence showed that respondent Cogdell escaped from the District of Columbia Jail on August 26, 1976, and was apprehended on September 28, 1976, while hiding under a pile of clothes in the closet of a residence in Hyattsville, Maryland (I Cogdell Tr. 26, 56).[8] Respondent offered to prove at trial that his escape was compelled by intolerable conditions at the District of Columbia Jail (App. 230; I Cogdell Tr. 13-14). Because respondent had not surrendered to authorities following his escape, however, the trial court ruled that he was not entitled to raise the proposed defense, and it excluded the proffered evidence (App. 228-230; I Cogdell Tr. 11-14).

---

[8] Respondent Cogdell had been brought to the District of Columbia Jail under a writ of habeas corpus ad prosequendum to appear for a status call in the District of Columbia Superior Court, where he had been indicted for forgery, unauthorized use of a vehicle, and carrying a pistol without a license (I Cogdell Tr. 22-29). He was transferred to the District of Columbia Jail from the Fairfax County Jail in Virginia, where he had been committed following a state conviction for uttering and delivering a forged instrument (Pet. App. 102a & n.3).

C. The Decision of the Court of Appeals

The court of appeals, with one judge dissenting, reversed the convictions in both cases and remanded for new trials. The majority concluded that the district court erred in its instructions concerning the intent element of the escape offense and in its imposition of a "return requirement" on the defense of duress.

1. The court of appeals began with the observation that any attempt to label escape as a "general intent" or a "specific intent" crime only generated "unnecessary confusion" and "unhelpful complexity" that impeded analysis (Pet. App. 6a-7a). In the court's view, although the word "escape" is not "self-defining," it implies "an intent to leave and not to return" (*ibid.*, quoting *United States* v. *Nix*, 501 F.2d 516, 518 (7th Cir. 1974)) or "an intent to avoid confinement" (Pet. App. 8a). The court agreed that the "intent to avoid confinement" is ordinarily established merely by proof of the act of flight from custody (*id.* at 9a). It held, however, that where the defense offers "evidence of jail conditions, threats, and violence such as that presented" by respondents, it is at least questionable whether the escape was based on an intent to avoid "confinement" or an intent to avoid the unpleasant conditions present at the jail (*id.* at 10a). The court sharpened its exposition by explaining that the intent element of the escape offense is the intent to avoid "normal conditions of confinement" (*id.* at 9a n.17; emphasis in original):

> [I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such "non-confinement" conditions, the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement.

On this basis, the court concluded that the trial judge erred in instructing the jury that the intent element of the crime encompassed only the general intent consciously and willfully to flee from confinement. Instead, where the issue of intent is raised by the defense, it is for the jury to decide whether the defendant was motivated by the improper desire to avoid "confinement" per se or by the permissible desire to avoid onerous conditions "that are not normal aspects of 'confinement' " (Pet. App. 9a n.17, 11a).[9]

---

[9] Where the issue of intent is raised by the defendant, the court stated (Pet. App. 11a) that the

> prosecutor may argue that the conditions allegedly necessitating the defendant's departure from custody were relatively mild, that alternative remedies short of escape (*e.g.*, resort to prison authorities or the courts) were available, or that the defendant failed to return voluntarily to custody once the conditions allegedly motivating the escape no longer threatened him.

The charge given in this case improperly precluded the jury from considering such evidence in relation to respondents' intent (*id.* at 14a-15a).

2. The court of appeals also held that the trial judge erred in refusing to submit the defense of duress to the jury on the ground that respondents had failed to surrender to lawful authorities following their escape. The court conceded that respondents' evidence of threats and harsh conditions of confinement "does not establish a classic [duress or] necessity defense" (Pet. App. 17a n.29). As the court noted (*id.* at 16a n.29):

> The duress defense normally requires a defendant to establish that he engaged in criminal conduct only because he was compelled to do so by another person's unlawful threat which caused him reasonably to believe that he must commit the crime to avoid imminent death or serious bodily harm to himself or a third person.

The evidence of harsh prison conditions in this case concerned events long preceding the escape, and there was no evidence that, at the time the escape occurred, respondents faced imminent harm from the claimed improper conditions (*id.* at 63a; Wilkey, J., dissenting). The court solved the problem by "avoiding unhelpful labels such as 'duress' and 'necessity'," with their settled common law meaning, and "by concentrating on the basic principles underlying [the] proffered defense" (*id.* at 17a). It dismissed the traditional duress requirement of imminent or " 'immediate' harm" as "particularly inappropriate in escape

cases, where a possibility of escape * * * is not likely to remain available until a substantial threat becomes 'immediate' * * *" (*id.* at 21a n.39). The court then concluded that there was sufficient evidence of harsh conditions at the District of Columbia Jail for the defense of duress to have been submitted to the jury in this case.

Moreover, while the court of appeals acknowledged that state and federal decisions have held that the defense of duress may be raised in an escape prosecution only where the defendant has voluntarily returned to custody following the escape (Pet. App. 23a, citing, *e.g.*, *United States* v. *Michelson*, 559 F.2d 567 (9th Cir. 1977), and *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974)), the court interpreted these cases as standing for the proposition that the duress defense "lasts only as long as" the conditions justifying escape continue to exist (Pet. App. 24a). Accordingly, where a defendant fails to make any reasonable effort to surrender after his escape, the question whether "the conditions establishing the defense * * * continue for the period [the] prisoner remains at large" (*id.* at 26a n.52) is an issue for the jury, not the trial judge, to determine (*id.* at 25a-26a).[10]

---

[10] Although the court of appeals therefore held that a duress defense must justify both the initial departure and the continued absence, it concluded that the return requirement was inapplicable to the facts of *this* case because respondents "were indicted [only] for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,' " rather than for failing thereafter

3. Judge Wilkey dissented. With regard to the defense of duress, Judge Wilkey stated that the relevant question (Pet. App. 89a-90a)

> is not whether a particular condition is or is not a "normal" incident of prison life, but, rather, is whether the condition is such as to raise in the defendant's mind a well-grounded apprehension of serious bodily injury or death.

Respondents' claims of harsh prison conditions did not fit the above definition, since they concerned incidents that occurred a considerable time prior to the escape. Judge Wilkey noted that there was nothing in the evidence to suggest that at the time of the escape respondents were acting in response to any imminent threat of death or serious bodily injury (*id.* at 63a-64a). Furthermore, Judge Wilkey observed that "[n]o evidence whatsoever was adduced to show that [respondents] turned themselves in after they had escaped the danger they alleged existed" (*id.* at 59a) and that respondents "adduced *no evidence whatever* justifying their continued absence from custody" (*id.* at 61a; emphasis in original). He therefore concluded that respondents' claims were insufficient as a matter of law to establish the defense of duress and that the trial judge correctly refused to place the issue before the jury.

---

to return to the jail (Pet. App. 25a). Hence, it was "error for the trial court to deny a [duress] instruction on the ground that the defendants had not returned or adequately explained their continued absence" (*ibid.*).

Judge Wilkey also disagreed with the court of appeals' conclusion that the evidence of prison conditions was relevant to respondents' intent in fleeing from the District of Columbia Jail. He observed that the court's construction of the federal escape statute as requiring a "specific intent" to escape from "normal aspects of confinement" constituted a radical departure from the common law definition of the crime, which, in the absence of any contrary legislative history, Congress presumably adopted in its enactment of 18 U.S.C. 751(a) (Pet. App. 74a-78a). He further noted that the majority's formulation of the intent element was in conflict with numerous decisions under Section 751 and analogous escape statutes and that, by weakening the prohibition against escape, it threatened serious consequences for the safe administration of federal penal facilities (*id.* at 78a-80a, 51a).

The court of appeals denied the government's petition for rehearing en banc by a 5-4 vote (Pet. App. 98a-99a, 117a-118a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Imprisonment of suspected or convicted criminals in England dates back to the early Middle Ages. For nearly as long, society had been plagued by the problem of prison escape.[11] Such escapes, because of their

---

[11] At common law there were two related crimes, "escape" and "prison breach." Both involved an unauthorized departure from custody, but the latter offense was accomplished with the use of force. 1 M. Hale, *Pleas of the Crown* 590 (1847); R. Perkins, *Criminal Law* 501 (2d ed. 1969); 1 W. Burdick,

potential for substantial violence and disorder and their contempt for the rule of law (see *United States* v. *Brown*, 333 U.S. 18, 21 n.5 (1948)), have always been treated as extremely serious matters.[12]

The court of appeals' decision in this case departs radically from prior analysis of the crime of escape. The court's conclusion that escape constitutes a crime only when the prisoner is acting with the "specific intent" to avoid "normal conditions of confinement" is a novel interpretation of the offense that draws no support from the language or legislative history of the federal escape statute and that conflicts with numerous state and federal decisions. Moreover, the court's conclusion that a defense of duress based on harsh prison conditions may be raised at trial even though the prisoner was not threatened with imminent serious harm, failed to avail himself of lawful civil remedies, and remained in hiding over a prolonged period of time after the escape converts

---

Law of Crime § 307 at 462, § 312 at 468 (1946). See *Hobert and Stroud's Case*, 79 Eng. Rep. 784 (K.B. 1630). These distinctions have been largely eliminated in American criminal law, and the federal escape statute, 18 U.S.C. 751, encompasses both offenses. See *Model Penal Code* § 208.33 at 133, Comment (Tent. Draft No. 8, 1958).

[12] See R. B. Pugh, *Imprisonment in Medieval England* 218, 227 (1968). References to escape have been traced as far back as the Pipe Roll of 1130, and the first recorded punishments for the offense occurred during the reign of Henry I. It was the original practice to treat all escaped prisoners as though they were convicted felons and to require them to suffer the felon's fate. *Id.* at 227-228. See L. Fox, *The English Prison & Borstal Systems* 19-20 (1952).

the crime into a self-help device for prison conditions that an inmate deems intolerable.

I

The district court correctly refused to instruct the jury on respondents' defense of duress. Although a defendant generally is entitled to have the jury charged on his theory of the case, a court need not give an instruction if it lacks evidentiary support. The proof in this case failed to satisfy several essential elements of the duress defense.

A. The concept of "coercion" as an affirmative defense to a criminal charge has long been part of our criminal justice system. The rationale for the defense is that a person who has been compelled by human or natural forces to commit an offense against his will cannot fairly be blamed for his wrongful act. Although the conduct remains criminal, for reasons of social policy it is excused.

Not long after the defense was recognized, however, it became apparent that it was susceptible to abuse. Defendants could assert that their unquestionably criminal actions were the product of coercion, and such assertions were often difficult to disprove. As a result, the defense was quickly hedged by restrictions designed to limit its availability to situations in which the defendant had no reasonable alternative but to commit the offense charged: the force or threats that prompted the criminal conduct must have produced in the defendant a reasonable fear of immediate death or serious bodily injury,

the defendant must have had no reasonable opportunity to avoid the threatened harm, and the criminal acts must not have exceeded the magnitude or duration of the coercion.

B. Although, in theory, duress has always been available as a defense to the crime of escape, courts have been reluctant to allow inmates to contend that their unauthorized departure was compelled by intolerable prison conditions. Such claims could easily be made in virtually every escape prosecution, and any suggestion that there might be a legal justification for escape could lead to a rash of prison escapes or a breakdown in prison discipline.

In an effort to accommodate these legitimate concerns with the equally legitimate demands of prisoners forced to flee from custody because of genuine dangers to their health or safety, the courts have insisted on scrupulous adherence to a number of requirements patterned after the traditional duress standards. The prisoner must show that he was faced with a specific threat of death or substantial bodily injury in the immediate future, that there was no time or opportunity to complain to the authorities or resort to the courts, and that he ceased his criminal acts at the earliest reasonable moment by turning himself in once he had attained a position of safety.

C. The evidence offered by respondents failed to meet the immediacy or return requirements of the duress defense. The allegations of fires, threats and assaults at the District of Columbia Jail all related

to past incidents, not to imminent threatened harm, and respondents did not surrender after the escape or otherwise explain their continued and prolonged absence from custody.

The reasons offered by the court of appeals to excuse compliance with these conditions are unpersuasive. Even if the "imminent harm" standard should be applied liberally in escape cases because of the realities of the prison environment, it would not help respondents here. There was no reasonable temporal relationship between the threatened injuries and the commission of the illegal acts. Moreover, the indictment sufficiently charged respondents with a continuing offense to require them to explain their failure to return to prison after the escape.

II

A. The court of appeals erred in holding that the crime of escape requires proof of a "specific intent" to avoid "normal aspects of confinement" and that the evidence of harsh prison conditions should therefore have been submitted to the jury for its bearing on respondents' intent.

1. At common law, escape consisted simply of a prisoner's unauthorized departure from lawful custody. No state of mind was required to commit the offense other than the intent to go beyond permitted limits.

2. Nothing in the language or background of the federal escape statute reflects a congressional intent to depart from the common law rule. 18 U.S.C.

751(a) broadly prohibits all "escape[s] from * * * custody." The word "escape" is unqualified, and undefined terms in a statute, especially a criminal statute, are presumed to have their common law meaning. Indeed, the legislative history of Section 751(a) confirms that Congress did not intend to alter the mental element traditionally required for escape, because it considered and rejected a proposal that would have limited the crime to departures from prison committed "with intent to escape from custody."

3. The lower courts have consistently construed the federal escape statute to require only a general intent to leave custody. The sole federal decision relied on by the court of appeals, *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974), was concerned with the application of the intoxication defense to escape cases and expressly declined to label the "intent to avoid confinement" required by Section 751(a) as a "specific intent." Moreover, the phrase "intent to avoid confinement" hardly suggests that an inmate must have departed the prison with any ultimate motive or purpose, much less lends support to the court of appeals' unprecedented conclusion that the escape statute requires the government to prove a "specific intent" to escape from "normal" incidents of confinement.

4. It follows from the conclusion that escape is a general intent crime that respondents' evidence of conditions at the District of Columbia Jail was irrelevant to the issue of intent. Defenses such as duress and necessity, unlike defenses such as mistake, insanity, or intoxication, do not exculpate by negating the mental element of the crime. A defendant who commits an offense under coercion nonetheless possesses mens rea, although for reasons of social policy he may be excused from criminal liability. The proof at trial showed beyond a reasonable doubt that respondents knowingly left the jail and that they were aware of the consequences of their actions. Hence, even assuming that their escape was the result of overwhelming compulsion, respondents still would have acted with the requisite criminal intent.

B. The court of appeals' formulation of the intent requirement contains the seeds of substantial mischief. The primary focus of future escape trials will be a factual assessment of the acceptability or "normality" of an inmate's conditions of confinement. By thus weakening the prohibitions against escape, the decision below threatens to subvert prison discipline and to endanger corrections personnel and the public.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY REFUSED TO INSTRUCT THE JURY ON THE DEFENSE OF DURESS

A. The Duress Defense Has Always Been Confined to Instances in Which the Defendant Had No Reasonable Alternative But to Commit the Crime Charged

The concept of "duress" as an affirmative defense to a criminal charge is "anciently woven into the fabric of our culture." J. Hall, *General Principles*

of Criminal Law, 416 (2d ed. 1960).[13] Generally, a person will not be held criminally liable if he has been forced by another to commit the offense. The rationale for the defense is excuse: although the act committed is criminal, "for reasons of social policy, it is better that the defendant, faced with

[13] See Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. 289, 291 (1974). The common law defense of compulsion, recognized as long ago as 1551 in *Reninger* v. *Fagossa*, 75 Eng. Rep. 1, distinguished between "duress" and "necessity." See 1 M. Hale, *supra*, at 49-57. The defense of "duress" excused unlawful conduct resulting from the threat of another person. W. LaFave & A. Scott, *Handbook on Criminal Law* § 49 (1972). Duress could be invoked only to excuse the specific offense that the defendant had been forced to commit. Gardner, *The Defense of Necessity and the Right to Escape from Prison—A Step Towards Incarceration Free From Sexual Assault*, 49 S. Cal. L. Rev. 110, 120 (1972). By contrast, the defense of "necessity" involved compulsion by natural forces and justified the defendant's selection of unlawful conduct as the lesser of the evils. 1 W. Burdick, *supra*, § 198 at 261; W. LaFave & A. Scott, *supra*, § 50. "Necessity" was also theoretically distinct from "duress" because it negatived the actus reus element of criminal responsibility. The actor accepted responsibility for his act but asserted that it was neither morally nor legally wrong under the circumstances. If the defense of "necessity" was successful, the act was condoned and the actor sometimes lauded for his exercise of judgment. Gardner, *supra*, 49 S. Cal. L. Rev. at 116. These distinctions have become blurred over the years, and the courts have used the terms interchangeably. See *United States* v. *Cullen*, 454 F.2d 386, 391 n.12 (7th Cir. 1971); 1 W. Burdick, *supra*, § 198 at 260-261; W. LaFave & A. Scott, *supra*, § 49 at 374, § 50 at 382; *Model Penal Code* § 209 at 5, Comment (Tent. Draft No. 10, 1960); 43 U. Cin. L. Rev. 956, 961 (1974); 37 Mo. L. Rev. 550, 551 & n.13 (1972).

a choice of evils, choose to do the lesser evil (violate the criminal law) in order to avoid the greater evil threatened by the other person." W. LaFave & A. Scott, *Handbook on Criminal Law* § 49 at 374 (1972). Blackstone offered the following explanation:

> A * * * species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts which are done through unavoidable force and compulsion.

4 W. Blackstone, *Commentaries on the Laws of England* 27 (1897). Simply stated, it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act.

Despite these broad justifications, the duress defense has been limited from the outset in several significant respects. The obvious reason for these restrictions is that the doctrine "held within it the germs of potential disorder." Newman & Weitzer, *Duress, Free Will and the Criminal Law*, 30 S. Cal. L. Rev. 313, 314 (1957). If believed by the jury—and proof of duress often consisted of little more than the accused's self-serving assertions—the de-

fense operated to free defendants who had admittedly committed all the elements of a criminal offense. "The business of excusing individuals from crimes which, in the last analysis they had committed bodily, was a difficult and dangerous affair. Who could see or wisely guess at the presence of a will which freely motivated the body in that dreadful moment of criminal action? Inference, not observation, was the species of proof, and inferences, it was thought, required the aid of standards. If the doctrine was not to be the plaything of the shrewd and the unscrupulous (and were not those suspected of crimes already questionable in that respect?) it had to be well hedged and strict of proof." *Ibid.*

Hence, the defense became subject to three main limitations. First, the threatening conduct that prompted the criminal act must have produced in the defendant a reasonable fear of immediate death or serious bodily harm. 1 W. Burdick, *supra*, § 199 at 262-263.[14] "Threatened *future* death or serious bodily harm, or threatened immediate *non-serious* bodily harm or property damage, or a threat which produces an *unreasonable* fear of immediate death or serious bodily harm, will therefore not suffice." W. LaFave & A. Scott, *supra*, § 49 at 377-378. Second, the defense was not recognized for the crime of mur-

[14] See *United States* v. *Wood*, 566 F.2d 1108, 1109 (9th Cir. 1977); *United States* v. *Kelley*, 546 F.2d 42 (5th Cir. 1977); *United States* v. *Patrick*, 542 F.2d 381, 388 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977); *D'Aquino* v. *United States*, 192 F.2d 338, 358 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952).

der.[15] Finally, the defendant must have had no reasonable opportunity to avoid the threatened harm, and the threat must have lasted for the duration of the criminal conduct.[16]

Each of these essential conditions was designed to confine the defense to those situations, and only those situations, in which the commission of the crime was unquestionably the lesser of the evils with which the defendant was faced. If the accused could have eluded the threat or force without committing the crime, or if the scope of the crime exceeded the extent of the threat either in magnitude or in time, then there was no reason for society to consider commission of the offense as the most acceptable alternative under the circumstances or to absolve the

[15] See W. LaFave & A. Scott, *supra*, § 49 at 377; Note, *Have the Doors Been Opened?—Duress and Necessity as Defenses to Prison Escape*, 54 Chi.-Kent L. Rev. 913, 918 (1978); 37 Mo. L. Rev. at 552 & n.15.

[16] See, *e.g.*, *Respublica* v. *McCarty*, 2 U.S. (2 Dall.) 86 (1781), where the defendant, charged with treason by joining the army of Great Britain, contended that he had done so under duress, having already been taken prisoner. The court rejected the claim, noting that defendant had "remained * * * with the British troops for ten or eleven months, during which he might easily have accomplished his escape; * * * had the defendant enlisted merely from the fear of famishing, and with a sincere intention to make his escape, the fear could not surely always continue, nor could his intention remain unexecuted for so long a period" (*id.* at 87). See also Note, *Duress and the Prison Escape: A New Use for an Old Defense*, 45 S. Cal. L. Rev. 1062, 1067 (1972); 43 U. Cin. L. Rev. at 963.

defendant of responsibility for his criminal actions.[17]

B. Although Duress is Available as a Defense to Prison Escape, the Defendant Must Show That He Fled in Order To Avoid An Imminent and Substantial Harm and That He Ceased The Illegality at the Earliest Reasonable Moment

Although coercion has always been theoretically available as a defense to the crime of prison escape,[18]

---

[17] Congress has never adopted rules that justify or excuse the commission of an otherwise unlawful act on the basis of duress or necessity (see National Commission on Reform of Federal Criminal Laws, *Study Draft of a New Federal Criminal Code* 38 (1970)), but the federal courts have consistently applied the common law duress defense, including the three requirements outlined above, in federal prosecutions. See, *e.g.*, *United States* v. *Saettele*, 585 F.2d 307, 309 & n.2 (8th Cir. 1978), cert. denied, No. 78-835 (Feb. 21, 1979); *United States* v. *Gordon*, 526 F.2d 406, 407 (9th Cir. 1975); *United States* v. *Nickels*, 502 F.2d 1173, 1177 (7th Cir. 1974); *R.I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F.2d 603, 605 (1st Cir. 1949); *Shannon* v. *United States*, 76 F.2d 490, 493 (10th Cir. 1935).

S. 1, 94th Cong., 1st Sess. § 531 (1975), the initial version of the bill designed to revise the federal criminal code, provided that "[i]t is an affirmative defense to a prosecution under any federal statute, other than a prosecution under section 1601 (Murder), that the defendant engaged in the conduct charged because another person coerced him to do so by a clear threat of imminent and inescapable death or serious bodily injury to himself or any other person * * *." The amended version of the bill, S. 1437, 95th Cong., 2d Sess. § 501 (1978), eliminated this section in favor of a general provision recognizing "an affirmative defense of * * * duress * * * [which] shall be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience."

[18] See 1 M. Hale, *supra*, at 611, citing 2 E. Coke, *Institutes* 590 (1630):

> If the prison be fired by accident, and there be a necessity to break prison to save [the prisoner's] life, this excuseth the felony; but if the prison were fired by the prisoner himself, or by his procurement, the breaking to save his life is nevertheless felony, for it was a necessity of his own creating.

See also *Baender* v. *Barnett*, 255 U.S. 224, 226 (1921) ("common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—'for he is not to be hanged because he would not stay to be burnt' "); Gardner, *supra*, 49 S. Cal. L. Rev. at 119 n.48.

courts have shown an understandable reluctance to relieve escapers of criminal liability on the ground that they were acting under "duress."[19] For one thing, "if prisoners were to decide when conditions were intolerable and treatment inhuman no discipline in a prison would be possible * * *." Newman & Weitzer, *supra*, 30 S. Cal. L. Rev. at 321. In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety. As Judge

---

[19] To some extent this judicial hesitancy is attributable to the fact that most prison escape cases do not satisfy the classic duress model. Duress "generally supposes commission of the very crime demanded by the coercer. In this way the coercer is liable for the crime although his agent, the coerced, may be excused. The theory * * * breaks down when the agent commits a crime other than the one demanded by the coercer." Gardner, *supra*, 49 S. Cal. L. Rev. at 128. Indeed, the court of appeals acknowledged that "[m]ost of the arguments and evidence presented by [respondents] do not fit within the standard definition of a 'duress' or 'necessity' defense" (Pet. App. 16a n.29).

Wilkey remarked (Pet. App. 51a), "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape, and disproof of such claims can be quite difficult."

Moreover, the duress defense, always subject to abuse, would be particularly susceptible to misuse at the hands of prison inmates, a group that has already demonstrated its willingness to break the law. An "inmate may escape from prison to attain his freedom in the hopes that he will not be apprehended; later, if arrest appears imminent, he may turn himself in to the authorities and plead duress as a defense to the escape." Note, *supra*, 45 S. Cal. L. Rev. at 1066. Prisoners might also plot together to "coerce" their fellow prisoners to escape in the hope of providing a risk-free defense in the event that the escapers are captured. See 1975 U. Ill. L. F. 271, 278; Note, *supra*, 45 S. Cal. L. Rev. at 1081. In sum, in order to discourage a rash of prison escapes or challenges to prison discipline caused by suggesting that there might be a legal justification for escape, courts until quite recently, while willing in theory to recognize defenses based on compulsion as applicable in escape cases, always found reasons to deny the defense on the particular facts before them.

The most comprehensive explication of the inevitable tensions between the duress defense and the crime of prison escape is provided in *People* v. *Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110

(1975), the first appellate decision to analyze the competing considerations and to find the defense available to an escape defendant. There, the defendant, a female inmate of low intelligence, had been threatened repeatedly by a group of inmates who sought to force her to perform lesbian acts. When the defendant's complaints to the prison authorities elicited no response and she was again confronted by a hostile group that promised to return, she fled. Defendant was quickly apprehended in a hayfield a few yards from the prison. The trial judge refused to charge the jury on the defense of duress, and the defendant was convicted of escape.

The California Court of Appeal reversed, holding that the defendant was entitled to a duress instruction in light of her offer of proof. The court remarked that, despite the indisputable public interest in deterring prison escapes, "[i]n a humane society some attention must be given to the individual dilemma" of an inmate threatened with substantial harm if he remains within the penal institution. At the same time, however, the court stressed that "the defense of necessity to an escape charge is extremely limited in its application" (43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115), and it set fourth five conditions that must be satisfied by the evidence before the defense may be submitted to the jury (43 Cal. App. 3d at 831-832, 118 Cal. Rptr. at 115):

> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

The proof offered by the defendant had established all but the final "return" requirement, and that issue was incapable of resolution because she had been captured so soon after her departure.

The conditions adopted in *Lovercamp* in an effort to tailor the traditional duress defense to the crime of prison escape have met with widespread acceptance in a number of other jurisdictions over the past four years. See, *e.g.*, *United States* v. *Boomer*, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978); *Stewart* v. *United States*, 370 A.2d 1374 (D.C. 1977); *State* v. *Reese*, 272 N.W.2d 863 (Iowa 1978); *State* v. *Horn*, 58 Haw. 252, 566 P.2d 1378 (1977); *Johnson* v. *State*, 379 A.2d 1129 (Del. 1977); *State* v. *Boleyn*, 328 S.2d 95 (La. 1976); *State* v. *Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975); *Commonwealth* v. *Stanley*, No. 297 (Pa. Super. Ct. April 12, 1979). See also *United States* v. *Bryan*, 591 F.2d 1161, 1162-1163 (5th Cir. 1979); Note, *supra*, 54 Chi.-Kent L. Rev. at 930 n.104. Two of the *Lovercamp* prerequisites are particularly important and particularly relevant to respondents' claims in this case: the requirements that the threat of harm be immediate and that the inmate surrender promptly once the immediate danger has been avoided by the escape.

The immediacy requirement is, of course, nothing more than a restatement of black letter law applicable to every attempt to assert a coercion defense. See pages 24-25, *supra*. The element of immediacy insists upon recourse to lawful alternatives whenever possible; hence, this requirement makes the defense unavailable whenever sufficient time exists for the defendant to exercise such options. Stated differently, when there is ample opportunity either to avoid a perceived threat or to seek a lawful solution to the problem, there is no reason to excuse a violation of the law. Moreover, "until the threatening disaster is pretty close to happening, there may arise a chance both to refuse to do the criminal act and also to avoid the threatened harm * * *." W. LaFave & A. Scott, *supra*, § 49 at 379. See *United States* v. *Wood*, *supra*, 566 F.2d at 1109; *United States* v. *Gordon*, *supra*, 526 F.2d at 408.

A prisoner's obligation to surrender after his escape is also closely related to a basic limitation on the duress defense—that the crime not exceed the extent of the coercion. "An important element of establishing duress is showing that the criminal activity stopped as soon as possible after the threat was removed. When a prisoner escapes under compulsion the threat is removed once he is outside the prison.

Consequently, an escapee must prove that he attempted to turn himself in to the authorities as soon as practicable after the escape." 43 U. Cin. L. Rev. at 963.

As we have previously noted, the defense of duress excuses an offense committed as the result of fear of imminent death or grievous bodily harm. Thus, if a defendant can establish that such factors prompted his departure from confinement, the defense may excuse *that* particular act. The courts are in agreement, however, that escape under 18 U.S.C. 751(a) is a continuing offense and that, even though an inmate's initial flight from prison may have been excusable, his continued absence from custody is itself sufficient to constitute the crime.[20] Hence, although the force or threats upon an inmate may have been genuine and compelling at the time of his departure, they cannot forever provide him with an ironclad defense to an escape charge. Evidence of duress justifying only a prisoner's initial escape would be an insufficient defense, as a matter of law, since it would fail to excuse his subsequent, continuing escape. See *United States* v. *Michelson*, *supra*, 559 F.2d at 570 (footnotes omitted):

[20] See *United States* v. *Chapman*, 455 F.2d 746, 749 (5th Cir. 1972). See also *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States* v. *Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976); *United States* v. *Woodring*, 464 F.2d 1248, 1250 (10th Cir. 1972); *United States* v. *Coggins*, 398 F.2d 668 (4th Cir. 1968); *Chandler* v. *United States*, 378 F.2d 906, 908 (9th Cir. 1967).

> [W]hile coercion may shield the escapee from the imposition of additional punishment, it does not commute the sentence previously imposed. * * * For this reason, an escape will not be excused by reason of duress if the escapee fails to submit to proper authorities immediately after attaining a position of safety. The inmate's failure to submit to proper authorities following the allegedly coerced escape amounts to an unexcused commission of the crime of escape. Therefore, when an escapee fails to submit to proper authorities, the asserted duress defense must be rejected because as a matter of law it does not negate the continued absence from custody.

Accord, *United States* v. *Bryan*, *supra*, 591 F.2d at 1162; *United States* v. *Boomer*, *supra*, 571 F.2d at 545. See also Annot., 69 A.L.R. 3d 678, 689 (1976).

There are, in addition, compelling policy reasons for scrupulous adherence to the return requirement, because it eliminates many of the pragmatic problems that attend application of the duress defense to escape cases. As the court explained in *People* v. *Lovercamp*, *supra*, 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115, the rule requiring a prisoner to turn himself in to the proper authorities upon attaining a position of safety from the threat renders the duress defense "meaningless to one who would use it as an excuse to depart from lawful custody and thereafter go his merry way relieved of any responsibility for his unseemly departure." In this respect, the requirement serves not only to prevent a perceived danger from

constituting a perpetual defense to an escape charge, but also to confirm the bona fides of the defendant's motivation for departing from custody. If, indeed, the inmate's only objective in escaping is to avoid an imminent and serious threat to his health or safety, once he has avoided the harm there is simply no justification for him to remain a fugitive and to forego relief from any continuing dangers through legitimate channels. The return requirement thus serves as a significant protection against manipulation of the duress defense by those whose subsequent conduct reveals a lasting intent to avoid serving their lawful term of custody.[21]

---

[21] Three state courts have held that a defendant's failure to turn himself in to the authorities after his escape, while relevant to the defendant's motivation for leaving the prison, does not prevent the assertion of a duress defense as a matter of law. *Esquibel* v. *State*, 91 N.M. 498, 576 P.2d 1129, 1132 (1978); *People* v. *Unger*, 66 Ill.2d 333, 362 N.E.2d 319, 323 (1977); *People* v. *Luther*, 394 Mich. 619, 232 N.W.2d 184, 187 (1975). These decisions do not evaluate the return requirement in light of the continuing character of the escape offense, nor do they consider the relation between the return requirement and the traditional element of the duress defense that criminal conduct not exceed the duration of the coercive threats or force. In any event, as respondents have acknowledged (Walker Br. in Opp. 12 n.8), "[t]he manner in which state courts construe state statutes prohibiting escape, and the common law or statutory defenses to such crimes, is of course a different matter from the appropriate construction of a federal statute and the common law defenses appropriate for it."

C. The Evidence at Trial Failed to Satisfy The Requirements of the Duress Defense and Hence Did Not Warrant a Duress Instruction

In light of the principles outlined above, the proof offered at trial did not entitle respondents to an instruction on the defense of duress. Although a defendant generally is entitled to have the jury charged on his theory of the case, it is well settled that an instruction should not be given if it lacks evidentiary support. See, *e.g.*, *Sansone* v. *United States*, 380 U.S. 343, 349-350 (1965); *United States* v. *Morales*, 577 F.2d 769, 774 (2d Cir. 1978); *United States* v. *Waskow*, 519 F.2d 1345, 1347 (8th Cir. 1975). When evidence has been presented in an attempt to raise an affirmative defense, the district court has the duty of determining whether the defense has a sufficient factual basis to place it before the jury. *Pierce* v. *United States*, 414 F.2d 163, 166 (5th Cir.), cert. denied, 396 U.S. 960 (1969); *Devine* v. *United States*, 403 F.2d 93, 95 (10th Cir. 1968), cert. denied, 394 U.S. 1003 (1969). If the evidence, taken in the light most favorable to the defendant, fails to establish the defense, then there is no factual issue for the jury to decide, and the court may properly refuse the instruction as a matter of law. *United States* v. *Glassel*, 488 F.2d 143, 146 (9th Cir.), cert. denied, 410 U.S. 941 (1973); *United States* v. *Ramsey*, 374 F.2d 192 (2d Cir. 1967).

1. The evidence offered by respondents failed to satisfy the immediacy requirement of the duress defense. In the context of prison escape, the courts have consistently required the perceived threat to be

of such imminence that the defendant had no reasonable alternative but to flee from custody.[22] Although respondents Bailey, Cooley, and Walker testified that they had presented unavailing complaints through the jail's grievance system concerning the brutality, threats, and fires in the Northeast-1 cellblock,[23] and

[22] See, *e.g.*, *United States* v. *Kelley*, 546 F.2d 42 (5th Cir. 1977); *Brawdy* v. *State*, 590 P.2d 689, 691 (Okla. Crim. 1979); *Roy* v. *Commonwealth*, 500 S.W.2d 921, 922 (Ky. 1973); *State* v. *Boleyn*, *supra*, 328 S.2d at 97 n.2; *State* v. *Milum*, 213 Kan. 581, 516 P.2d 984, 986 (1973); *State* v. *Green*, 470 S.W.2d 565, 568 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972); *People* v. *Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 603-604 (1969); *State* v. *Davis*, 14 Nev. 439, 444 (1880). See generally Annot., *supra*, 69 A.L.R. 3d at 684-686.

[23] Corrections officials testified that respondents Cooley and Walker had never filed a grievance (App. 65-66, 207; Tr. 245-246, 743) and that the complaints filed by respondent Bailey had been investigated and found to be groundless (App. 63-64; Tr. 243).

During the period in question, the District of Columbia Jail offered inmates a number of formal procedures for voicing complaints about conditions of confinement. An aggrieved prisoner could complain orally to a staff member, case worker, or social worker, or to a legal aid or retained attorney, he could file a written complaint by placing it in a sealed mailbox (App. 209-210; Tr. 753), or he could submit a grievance petition to the Jail Adjustment Board or to supervisory officials (App. 61-62, 65-66; Tr. 239, 246, 251-252). In instances of alleged threats or brutality by a guard, the shift supervisor would normally be appointed to conduct an investigation, which would entail an interview of the complaining inmate, the corrections officer involved, and any other person having knowledge of the incident. Corrective action would be taken where appropriate (App. 63-64, 67, 207; Tr. 242-243, 255, 743). The federal prisons contain an even more elaborate grievance procedure. See *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 138 n.* (1977) (Burger, C.J., concurring).

Bailey testified that he had initiated an action for damages against one prison guard in the District of Columbia Superior Court (App. 18, 58, 61-62, 116-118, 148-152, 157-158, 194-195; Tr. 225, 239, 404-405, 478-484, 534-535, 710), there was absolutely no justification on the record for Cooley and Walker to elect escape rather than pursuit of their judicial or other lawful remedies[24] or for Bailey to choose self-help rather than adjudication of his pending legal claim.[25]

[24] Respondent Cooley also contended that he had "made complaints to Judge Eugene Hamilton over at Superior Court" (App. 117-118; Tr. 405), but he did not elaborate on the content of these complaints or identify when they had occurred in relation to the alleged grievances or to the escape.

[25] The district court stated that it would have given a duress instruction but for respondent's failure to satisfy the return requirement (App. 219-220; Tr. 778-779). Although respondents and the court of appeals assume from this remark that the trial judge had concluded that respondents' evidence was sufficient to meet the immediacy requirement (see Pet. App. 21a n.39, 22a-23a n.43), this assumption may not be accurate. The district court did not expressly hold that respondents had satisfied the immediacy requirement, and the government's principal focus in opposing a duress instruction centered on the absence of evidence that respondents had attempted to surrender after their escape rather than on the imminence of the dangers that allegedly led to the escape.

Whatever the district court's view on the matter, it is clear that the court of appeals' concept of "immediacy" departs significantly from the traditional rule. As we discuss below, the majority expressly rejected the immediate harm standard as "an absolute prerequisite" in escape cases, "where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' * * *" (Pet. App. 21a n.39). In our view, Judge Wilkey correctly marshaled the precedents in observing that the defense is reserved for "back-to-the-wall situations" (*id.* at 63a).

Although one inmate asserted that cellblock fires were a daily occurrence (App. 99-100; Tr. 377), respondents themselves introduced documentary evidence which showed that the last of the fires (a trash fire) had occurred on August 16, 1976, 10 days prior to the escape (App. 78; Tr. 312, Deft. Exh. 1-B). Moreover, there was no evidence whatever to demonstrate that a fire had started in the cellblock on August 26, the day of respondents' escape, or that, immediately prior to the escape, respondents had any reason to anticipate an imminent recurrence of the incidents. Indeed, it appears that whether such conflagrations would pose a serious and immediate threat to the safety of respondents and the other inmates within the cellblock was often dependent upon respondents' own actions: respondent Bailey admitted that he had burned blankets, sheets and trash as a protest measure and respondent Cooley conceded that he had participated in such activities as well (App. 124, 173; Tr. 415, 572-573).[26]

By the same token, while respondents Bailey and Cooley claimed that they had been assaulted by prison guards, the evidence once again reflects that the latest of the alleged incidents occurred either in late July or early August 1976, several weeks prior to the escape (App. 101-104, 109-110, 111-112, 116, 171-172; Tr. 379-380, 382, 384, 393, 396, 403, 568-569).

[26] Life-threatening emergencies resulting from a defendant's own misconduct cannot provide the basis for a duress defense. See W. LaFave & A. Scott, *supra*, § 50 at 388; R. Perkins, *supra*, at 951-961; note 17, *supra*.

Specifically, one inmate testified that respondent Cooley had been assaulted with a blackjack in July or the early part of August and that another incident had occurred prior to that time (App. 102-103, 104-105; Tr. 382, 384, 385). A second inmate testified that the last assault on respondent Cooley took place "about two or three weeks" before the escape (App. 107; Tr. 389). Respondent Cooley himself placed the date that he was struck by guards as on or about August 9, 1976, more than two weeks prior to the escape (App. 116; Tr. 403). Similarly, in regard to respondent Bailey, one inmate testified that respondent had been assaulted by guards during the second week of August (App. 109-110; Tr. 393), while another alleged that the last of the attacks occurred closer to the first part of that month (App. 111-113; Tr. 396-397). For his part, respondent Bailey stated that he did not believe his "fights" and "scuffles" with corrections officers had occurred after the end of July (App. 171-172; Tr. 567-569).

Testimony concerning the alleged threats to respondents Bailey and Cooley followed a similar pattern. A defense witness estimated that the threats by corrections officers against respondent Cooley occurred in late July or early August 1976 (App. 101-102, 113; Tr. 380, 398). Respondent Bailey stated that he could not recall when the guards had threatened to kill him if he testified in the case in which he had been subpoenaed as a witness, but he conceded that he did not receive any threats immedi-

ately prior to his escape (App. 141-142, 155-156, 169-171, 174; Tr. 468-469, 532, 565-567, 583).

While respondent Walker presented evidence tending to show that he suffered from epileptic seizures (App. 183-188; Tr. 622-650), this evidence was also devoid of any suggestion that the alleged condition presented an immediate or life-threatening danger that warranted an escape. To the contrary, the proof established that, even though respondent Walker's condition was not confirmed by medical examination, medical personnel, relying solely upon respondent's complaints, had prescribed medication as a precautionary measure (App. 133-136, 190-191; Tr. 438-441, 679-681).[27]

Finally, although respondent Cooley initially claimed that respondents Walker and Bailey had threatened to kill him on the morning of the escape if he did not join them, he later repudiated this testimony and admitted that, when he left the jail, he was by himself and had no idea whether Walker and Bailey

[27] See *State* v. *Worley*, *supra*, 265 S.C. at 554, 220 S.E.2d at 243, and *People* v. *Davis*, 16 Ill. App. 3d 846, 306 N.E.2d 897, 898 (1974), holding that claims of inadequate medical treatment cannot excuse a prison escape unless the alleged condition constituted an immediate, serious threat to the prisoner's life or health and he had exhausted available legal remedies.

This Court held in *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976), that prison officials' deliberate indifference to an inmate's medical needs "constitutes the 'unnecessary and wanton infliction of pain' * * * proscribed by the Eighth Amendment." Respondent did not introduce any evidence to prove that he had attempted to avail himself of this judicial remedy or his remedy under the Federal Tort Claims Act.

had escaped as well (App. 115-116, 117-118, 130-131; Tr. 402, 405, 424-425).

In sum, as Judge Wilkey observed in dissent, the evidence offered by respondents "could hardly be found to establish the seriousness, immediacy, and imminence of danger required to make out duress" (Pet. App. 63a). Indeed, the majority did not expressly disagree with this conclusion: it instead rejected the "dissent's narrow insistence on threats of 'immediate' harm as an absolute prerequisite for the choice of evils defense," viewing the requirement as "particularly inappropriate in escape cases, where a possibility for escape (especially nonviolent escape) is not likely to remain available until a substantial threat becomes 'immediate' in the narrow sense urged by the dissent" (*id.* at 21a n.39).

The court of appeals' view of the immediacy requirement is troubling, since it necessarily implies that where an individual has the option of employing either lawful or unlawful means of averting future harm, he may choose the unlawful alternative. There admittedly is something to be said for the view that the traditional duress requirement of "imminent" harm should be relaxed somewhat in escape cases because of the realities of the prison environment.[28] But whatever the validity of this contention,

[28] In *Lovercamp*, for example, the lesbian inmates were not actually pursuing the defendant at the time of her escape. They had threatened her earlier in the day. Nonetheless, the court held that the immediacy requirement was satisfied because the jury could find that the defendant had been

it is of little help to respondents here. Unless the element of imminent threatened harm is to be wholly severed from the duress defense, contrary to both the common law rule and the policy reasons that gave rise to the defense, there must be *some* reasonable temporal relationship between the threatened injury and the commission of the illegal act. See Note, *supra*, 54 Chi.-Kent L. Rev. at 933; Note, *supra*, 45 S. Cal. L. Rev. at 1074-1075. The undisputed lapse of *several weeks* between the alleged fires, threats, and assaults and respondents' flight from the District of Columbia Jail cannot satisfy even this more liberal standard.

2. The evidence also was insufficient to meet the return requirement of the duress defense. It was conceded at trial that none of the respondents turned himself in to the proper authorities after he had escaped the dangers that allegedly existed at the District of Columbia Jail; each was captured by FBI agents more than a month later. Furthermore, respondents Bailey, Cooley and Cogdell admitted that they had not even attempted to contact the authorities after their escape, and although respondent Walker claimed a "constant rapport with the FBI," there was no evidence that he ever notified the agents of his whereabouts so that he could surrender. See pages 6-7, *supra*.

---

motivated to leave the prison by the threat of real and inevitable serious harm in the near—and unpredictable—future. 43 Cal. App. 3d at 832, 118 Cal. Rptr. at 115.

a. The court of appeals did not dispute the trial judge's finding that respondents had presented no evidence from which the jury could have found that they satisfied the return requirement (App. 219-220; Tr. 778-779). It nonetheless concluded that the defect was not fatal to respondents' duress claim and that the defense should have been submitted to the jury. Analyzing decisions, including *Lovercamp*, that have imposed a return requirement, the court held that the cases simply stood for the proposition that a choice of evils defense exists only so long as the conditions that led to the escape continue (Pet. App. 24a). Thus, "[a]n acceptable version of the 'return requirement' would include (1) an instruction that escape is a continuing offense, and (2) an instruction that a choice of evils defense cannot justify continued absence if the conditions establishing the defense * * * do not continue for the period a prisoner remains at large" (*id.* at 26a n.52). Hence, according to the court below, if confinement conditions that would justify an inmate's initial departure from prison persist (or perhaps even if the defendant only believes they persist) after the escape, they provide the inmate with an ongoing defense for his continued absence and relieve him of any obligation to seek correction of the threatening conditions by recourse to legitimate channels. As a consequence, the prisoner is not only not answerable for his initial escape, he also may remain at large with impunity so long as

the harsh condition that prompted the escape remain unchanged.[29]

This result is obviously unacceptable from the perspective of the public interest in assuring that convicted offenders remain incarcerated until released by legal processes. More important, the court of appeals' holding is conceptually unsound as an application of the duress defense, because it ignores the settled rule that the defense is only available when there is no reasonable alternative to a violation of the law. Once an inmate has escaped the allegedly life-threatening or intolerable prison conditions, there is no further justification for his remaining at large or for his failure to pursue lawful remedies to eliminate any continuing dangers to his health or safety.

We recognize, of course, that it is both futile and inhumane to insist that an escaped prisoner surrender himself at once to a facility where genuinely dangerous conditions persist merely in order to preserve a defense of duress to the escape. However,

[29] It is far from clear from the court of appeals' opinion how an escaped inmate would ever be aware whether the prison conditions that forced his escape have been eliminated during the period of his absence from custody. Here, for example, there was no evidence that respondents made any effort to determine whether the Northeast-1 housing unit continued to suffer fires during the several months following their escape. (It is unlikely that the court intended to require the government to notify an escaped inmate of the changed conditions, because prison officials obviously would not know of his whereabouts; indeed, until the inmate's capture the officials would not even know the particular confinement conditions that purportedly led to his escape).

neither the character of the duress defense nor considerations of the public interest necessarily demands that particular course of action as the exclusive means of fulfilling the return requirement. Where the conditions that led to an escape are of a continuing nature, the prisoner may terminate the escape by surrendering himself to any responsible person, such as a public official or defense counsel, or by procuring the assistance of an intermediary to effect his return to custody under terms that will assure his safety, or by seeking a judicial remedy. As Judge Wilkey observed (Pet. App. 59a), an escaped inmate truly concerned about his well-being if returned to prison "can turn, for example, to the community, to public agencies, to public or private legal services, to politicians, to church groups or other private organizations that are in a position to take the action necessary to protect him from untoward danger once he returns to custody." See also Note, *supra*, 54 Chi.-Kent L. Rev. at 934.[30]

Only by adducing evidence that these options were unavailable to him—in other words, that there were *no* reasonable alternative means of protecting himself from the dangers that prompted his escape except by remaining at large—should an escaped prisoner be permitted to excuse his continued absence on

[30] The district court made the same point in denying a duress instruction: respondents failed to "notif[y] the authorities or the public defender in an effort to surrender under conditions that might have been arranged by the public defender" (App. 219; Tr. 778).

the basis of duress. Respondents, however, never made any effort at trial to justify their continued absence by such a showing. They never turned themselves in, never attempted to turn themselves in, never sought the assistance of an intermediary to arrange for their surrender under conditions that would guarantee their safety, and never alleged that the coercion that purportedly led to their departure from the jail prevented their choosing one of these several alternatives to breaking the law. See *United States* v. *Michelson, supra*, 559 F.2d at 571; *Stewart* v. *United States, supra*, 370 A.2d at 1377.[31]

---

[31] Only respondent Walker introduced evidence that, if believed, tended to show some effort to terminate his escape. See pages 6-7, *supra*. By respondent's own admission, however, he received assurances that he would not be harmed by the FBI after his surrender, yet he declined to turn himself in. Although respondent claimed that he balked because the FBI agent refused to give similar assurances that he would not be returned to the District of Columbia Jail, respondent made no attempt to contact any other government official or community group in an effort to obtain that promise as a price for divulging his whereabouts. Instead, after a few telephone calls to the FBI, respondent chose to remain in hiding until he was captured four months later.

We doubt whether respondent Walker's minimal efforts—two or three brief telephone calls to a single FBI agent over a four-month period—satisfied the duty on an escaper, once free, diligently to pursue legitimate means of redress, rather than to pursue self-help through continued criminality. It is unnecessary to decide this question, however, because the evidence respondent presented concerning fires and inadequate medical treatment at the District of Columbia Jail was wholly insufficient to demonstrate that he faced an immediate threat to his health or safety that permitted no alternative but escape.

b. As noted above, although the court of appeals held that satisfaction of a return requirement is not an absolute prerequisite to the assertion of a duress defense, it did agree that escape is a continuing offense and that a defendant must therefore justify his continued absence from custody as well as his initial departure (Pet. App. 27a). Despite this conclusion, the court held that respondents had no obligation to explain their continued absence in *this* case, because the theory of escape as a continuing crime was not reflected in the indictment or in the trial judge's charge to the jury (*id.* at 24a). Instead, the court remarked, respondents "were indicted for 'flee[ing] and escap[ing]' '[o]n or about August 26, 1976,' and the trial court's instructions, rather than explaining a 'continuing offense' concept to the jury, emphasized the notion that the offense took place when [respondents] left the jail on August 26" (*id.* at 25a; footnotes omitted). Judge Wilkey correctly labeled this analysis as "patently frivolous" (*id.* at 61a).

18 U.S.C. 751(a) refers only to attempted or completed "escape"; there is no separate and discrete offense of "failing to return to custody" (Pet. App. 24a-25a). Escape under the federal statute has always been viewed as a single continuing offense that is not complete while the prisoner remains at large.

Consequently, even assuming that respondent Walker's evidence at trial was adequate, if believed, to show compliance with the return requirement, he nonetheless was not entitled to a duress instruction because of his inability to meet the immediacy requirement.

See page 32, note 20, *supra*. The initial departure and the subsequent absence are simply separate aspects of *every* consummated escape, since "[t]he act of absenting oneself from custody necessarily entails not only the initial severance of control but also the maintenance of that status for an appreciable period of time, whether that be one minute or one hour or one year" (Pet. App. 62a; Wilkey, J., dissenting); there is no authority to support the court's bifurcation of these two related acts into two distinct crimes. Respondents' failure to justify their absence from custody during the several months after they had left the jail thus rendered the duress defense unavailable as a matter of law as to the whole crime of escape, not merely as to the artificial "initial" or "subsequent" aspects created by the court below.

It is hardly significant that the indictment specified August 26, 1976, as the date of respondents' "escape" and did not specifically aver that their absence continued for some months thereafter. The date alleged was obviously intended to mark respondent's initial flight from lawful custody, when the crime began, rather than to delimit the duration of the offense. While an absence from custody of some measurable duration is implicit in the crime of escape, the duration itself is not a discrete component of the crime. An averment of the continuing nature of the offense is therefore not essential to the sufficiency of the indictment. See, *e.g.*, *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962). Indeed, under Section 751 the government is not even required to es-

tablish that the escape occurred at the moment of departure. See *United States* v. *Spletzer*, *supra*, 535 F.2d at 954. Yet no court that has predicated liability under the federal escape statute on a prisoner's unauthorized absence following an arguably excusable departure from custody has ever suggested that the continued absence aspect of the offense must be separately alleged. See, *e.g.*, *United States* v. *Michelson*, *supra*, 559 F.2d at 570-571; *United States* v. *Chapman*, *supra*, 455 F.2d at 749; *Chandler* v. *United States*, *supra*, 378 F.2d at 908.[32]

In any event, as the court below itself recognized (Pet. App. 25a), respondents were indicted for "flee-[ing] and escap[ing]" from custody (App. 9-10, 15). The former term connotes an absence of some duration. For example, in the context of 18 U.S.C. 3290, which deprives fugitives of the benefits of the statute of limitations, the phrase "flee from justice" has been construed to mean not only an initial departure from one's usual place of abode, but also a continued concealment for the purpose of avoiding arrest or prosecution. See, *e.g.*, *United States* v. *Wazney*, 529 F.2d 1287, 1289 (9th Cir. 1976); *Ferebee* v. *United States*, 295 F. 850, 851 (4th Cir. 1924). Cf. *Streep* v. *United States*, 160 U.S. 128 (1895). Hence, in-

[32] The court of appeals' construction of Section 751(a), if accepted, would require the government to charge virtually every escape under both alternatives of the court's "two crime" analysis in order to avoid the problem that would arise if the defendant attempted at trial to excuse his initial departure on the ground of coercion, mistake, intoxication, or some other defense.

clusion of the term "flee" in the indictment removes any semblance of plausibility from the court's semantic objection that the formal charge failed to encompass the continuing absence aspect of the offense.

Finally, the trial judge's failure to instruct the jury that the escape offense was a continuing one is inconsequential in the circumstances of this case. To begin with, contrary to the court of appeals' apparent assumption, the district court did inform the jury that escape consists of "absent[ing]" oneself from a place of confinement (App. 223; Tr. 802), a term that certainly conveys the continuing nature of the offense. Moreover, respondents never asked the court to inform the jury of the alleged bifurcated feature of the crime; their proposed duress instruction focused exclusively on the initial departure from custody (App. 17). See *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).[33] This strategy is certainly not surprising since, as we have already discussed, respondents produced absolutely no evidence tending either to show that they surrendered after their escape or otherwise to excuse their continued absence. As a result, respondents would not have benefited even under the court of appeals' "two crime" theory: an explicit instruction that the crime of escape could be committed by respondents' unjustified refusal to return to custody after they had fled from the District

[33] In fact, respondent Walker urged the court of appeals (Br. 42) to "reject the notion that a prisoner who escapes from prison and then remains absent commits not one, but two separate offenses under 18 U.S.C. § 751(a)."

of Columbia Jail would have offered the jury no rational alternative but to return convictions.[34]

II

THE EVIDENCE OF HARSH PRISON CONDITIONS WAS NOT RELEVANT TO RESPONDENTS' INTENT TO ESCAPE

The court of appeals held that, regardless of whether the evidence of harsh prison conditions presented by respondents was sufficient as a matter of law to make out an affirmative defense of duress, the evidence should have been submitted to the jury because it might have "negated the intent required to commit the crime of escape" (Pet. App. 4a). The court's analysis followed three steps: *first*, the federal escape statute does not create an absolute liability of-

[34] As Judge Wilkey explained (Pet. App. 62a; emphasis deleted):

> The majority's complaint is that the trial court precluded jury consideration of a duress defense and held as a matter of law that the defense was unavailable. However, the majority concedes that if the court had instructed the jury fully as to the "continuing offense" aspect of escape, then it could properly have held as a matter of law that the duress defense was unavailable and thereby have precluded jury consideration of the defense. Why should the result be different simply because in one case the trial court did not fully illuminate the "continuing offense" aspect of the offense for the jury and in the other case it did? The jury is not making the decision on the availability of the defense in either case; the court is making the decision in both cases as a matter of law. The amount of information conveyed to the jury is therefore irrelevant to the propriety of the trial court's legal decision.

fense, but rather requires proof of criminal intent; *second*, the intent required under the statute is an "intent to avoid confinement"; and *third*, "confinement" in this context refers only to those prison conditions that are "normal" and lawful incidents of incarceration (*id.* at 7a-9a). Hence, in the court's view, "if a prisoner offers evidence to show that he left confinement only to avoid conditions that are not normal aspects of 'confinement'—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied" (*id.* at 9a n.17).

The court of appeals' startling reformulation of the crime of escape to require proof of a "specific intent" to avoid "normal" incidents of confinement stems from a fundamental confusion concerning the element of intent. "Intent" in criminal law may be used in three different senses: (1) that the defendant performed the prohibited act deliberately, not accidentally or unconsciously; (2) that the defendant knew the act was wrongful; or (3) that the defendant did the act to further some ultimate goal. See W. LaFave & A. Scott, *supra*, § 28; *United States* v. *Cullen*, 454 F.2d 386, 390 (7th Cir. 1971). The first use is the narrowest, requiring merely that the actus reus be voluntary.[35] The second use implies

[35] The "intent" present here is minimal. Indeed, some commentators have included the concept of voluntariness in the definition of an "act," thus shading the actus reus into the mens rea. See R. Perkins, *supra*, at 749; W. LaFave & A. Scott, *supra*, § 25 at 179-180.

the additional element of mens rea, or consciousness of wrongdoing. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 436-437 (1978). Intent of the third type requires a showing that the defendant had a specific purpose or motive in performing the wrongful act. This type is referred to as "specific intent." [36]

The mental element required by the common law concept of the crime of escape and incorporated into 18 U.S.C. 751(a), the federal escape statute, is of the second type, requiring consciousness of wrongdoing but not proof of some ultimate goal. The evidence at trial showed beyond a reasonable doubt that respondents acted with this "general intent" when they left the District of Columbia Jail. Respondents did not dispute that they knew that they were in custody at the jail, that their actions would remove them from the physical confines of the jail, and that they had not received permission to depart. Proof of harsh conditions at the jail could not have negated this intent. The district court therefore properly charged the jury on the issue of intent and properly refused to allow the evidence of fires, threats and assaults to be considered on that issue.[37]

[36] A "specific intent" offense requires proof of "some specialized knowledge or design for some evil beyond the common-law intent to do injury." *Morissette* v. *United States*, 342 U.S. 246, 265 (1952). See *Williams* v. *United States*, 341 U.S. 97, 102 & n.* (1951); *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945); W. LaFave & A. Scott, *supra*, § 28 at 202.

[37] The trial judge instructed the jury as follows (App. 221; Tr. 799):

> Now, ladies and gentlemen, I wish to instruct you about a concept we call intent. It is important in any

A. The District Court Correctly Held That Escape Under 18 U.S.C. 751(a) is a General Intent Crime

1. At common law, the offense of escape consisted simply of a prisoner's unauthorized departure from lawful custody.

> An escape is committed whenever by any unlawful means a criminal in lawful custody voluntarily leaves and gains his liberty before he is delivered in the due course of the law.

3 *Wharton's Criminal Law and Procedure* § 1367 at 758 (1957). See also 1 W. Burdick, *supra*, § 307 at 462; 1 M. Hale, *supra*, at 608. The actus reus of the offense was the physical act of leaving the place of confinement, and the intent required to commit the crime was a general one. "No state of mind is required for guilt of escape other than the intent to go beyond permitted limits * * *." R. Perkins, *supra*, at 504. "The voluntary act of leaving lawful custody, without permission of law, is sufficient to constitute the general criminal intent required * * *." 1 W. Burdick, *supra*, § 311 at 467. See 3 *Wharton's*, *supra*, § 1367 at 764 ("The ordinary intent required to constitute the offense of escape * * * is the intent to do the act voluntarily * * *"); Gardner, *supra*, 49 S. Cal. L. Rev. at 124 n.81; *Model Penal Code* § 208.33 at 136, Comment (Tent. Draft No. 8, 1958).[38]

---

criminal case.

Intent means that a person had the purpose to do a thing. It means that he made an act of the will to do the thing. It means the thing was done consciously and voluntarily and not inadvertently or accidentally.

Some criminal offenses require only general intent, and that is true, ladies and gentlemen, of the offenses charged in this case.

Where this is so, and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act.

Respondents objected to this instruction at trial and in the court below because it did not require the jury to find that they left the jail with an intent to avoid confinement *permanently* (see Pet. App. 85a (Wilkey, J., dissenting); Brief for Appellant Bailey 16). The court of appeals held that the district court correctly rejected this "extreme interpretation" of the escape statute (Pet. App. 9a n.17).

[38] Accord, *State* v. *Morton*, 293 A.2d 775, 779 (Me. 1972); *State* v. *White*, 16 Ariz. App. 514, 494 P.2d 714, 717 (1972); *Alex* v. *State*, 484 P.2d 677, 679 (Alaska 1971); *People* v. *Spalding*, 17 Mich. App. 73, 169 N.W.2d 163, 165 (1969); *State* v. *Marks*, 92 Idaho 368, 442 P.2d 778, 780 (1968); *People* v. *Goldman*, 245 Cal. App. 2d 376, 383, 53 Cal. Rptr. 810 (1966); *State* v. *Wharff*, 257 Iowa 871, 134 N.W.2d 922, 925 (1965); *Wiggins* v. *State*, 194 Ind. 118, 141 N.E. 56, 57 (1923); *State* v. *Clark*, 32 Nev. 145, 104 P. 593, 594-595 (1909). See also *State* v. *Reese*, 272 N.W.2d 863, 865 (Iowa 1978); *State* v. *Liggett*, 363 S.2d 1184, 1186 (La. 1978); *State* v. *Boleyn*, *supra*, 328 S.2d at 98; and *People* v. *Noble*, 18 Mich. App. 300, 170 N.W.2d 916, 918 (1969), where the courts construed state escape statutes, which follow the common law formulation, to require only a general intent to depart.

In *Gallegos* v. *People*, 159 Colo. 379, 387, 411 P.2d 956, 960-961 (1966), the court held that the mental element of the escape offense requires an "intent of the accused to evade the due course of justice." See also *Cassady* v. *State*, 247 Ark. 690, 447 S.W.2d 144, 145 (1969); *State* v. *Hendrick*, 164 N.W.2d 57, 63 (N.D. 1969). While the court labeled this a "specific intent" requirement, in the absence of further explanation it does not appear that it entails anything more

The "general intent" element of the escape offense would thus absolve an inmate who left the confines of the prison while sleepwalking, or under a reasonable mistake concerning the boundaries of the prison grounds, or on the misimpression that he had been lawfully authorized to depart. See, *e.g.*, *People* v. *Weiseman*, 280 N.Y. 385, 21 N.E.2d 362 (1939); *State* v. *Pace*, 192 N.C. 780, 136 S.E. 11 (1926). See also *Ammidon* v. *Smith*, 14 U.S. (1 Wheat.) 447, 459 (1816). By contrast, however, "if a prisoner knows that he has no authority to leave prison and, whatever his motivation, still departs prison, with the purpose of departing, he has acted with the requisite intent" (Pet. App. 75a (Wilkey, J., dissenting); footnote omitted and emphasis deleted). In other words, escape at common law has always been considered only a "general intent" crime; "a specific intent is not required, in the absence of any statutory provision to the contrary." 1 W. Burdick, *supra*, § 311 at 467.[39]

---

than an intent to depart lawful custody, that is, a general intent to commit the crime. In any event, these cases lend no support to the court of appeals' novel formulation of the intent requirement under the federal escape statute.

[39] It is hardly surprising that the law of escape developed in this fashion. Crimes that require a "specific intent" are designed to combat discrete evils that relate to the defendant's motivation and not just his physical acts. For example, misstatements made with an intent to defraud, or seizures made with an intent to deprive the owner of his property permanently, present dangers to society far beyond those threatened by negligent misstatements or the temporary removal of a chattel. Hence, the false pretenses and larceny laws require proof of the defendant's motive, or specific intent, to bring about the greater evil. See W. LaFave & A. Scott, *supra*, § 28 at 202. Similarly, the federal civil rights laws (18 U.S.C. 241, 242) are intended to prevent deprivations of constitutional rights, not injuries caused under color of state law generally, and they therefore require proof that the defendant acted for the purpose of depriving a citizen of the enjoyment of those rights. With escape statutes, the design quite clearly is to protect the safety of the public and correctional officials and to preserve prison discipline by preventing persons convicted of crimes and placed in custody from knowingly removing themselves from the physical confines of that custody without permission, whatever the reason for the unauthorized departure. The potential dangers from a prison escape are the same regardless of the escaper's motivation. As a result, the law rightly has never made commission of the escape offense dependent upon proof of that motivation.

2. Nothing in the language of the federal escape statute reflects an intent to alter the common law elements of the offense. Section 751(a) speaks in the broadest terms in prohibiting "escape from * * * custody." The word "escape" is unqualified, and undefined terms in a statute are presumed to possess their common law meaning in the absence of legislative history to the contrary. See 2A A. Sutherland, *Statutes and Statutory Construction* § 48.18 at 224, § 50.03 at 227-228 (4th ed. 1973); *Morissette* v. *United States*, *supra*, 342 U.S. at 263. This is especially true in interpreting criminal statutes. *United States* v. *Turley*, 352 U.S. 407, 411-412 (1957).

The background of the federal escape statute, far from shedding no light on the matter, demonstrates quite clearly that Congress did not intend to depart from the traditional standards. The first bill to deal with the problem of escapes from federal custody was introduced in the House of Representatives in 1928.

H.R. 9021, 70th Cong., 1st Sess. The proposed legislation provided that

> if any person convicted of an offense against Federal statutes, committed to any Federal penal or correctional institution * * * shall break such prison and escape therefrom * * * such person shall be deemed guilty of escape. * * *

69 Cong. Rec. 1568 (1928). After passage in the House, however, the bill was amended by the Senate Judiciary Committee to require that the departure from prison be committed "with intent to escape from custody." S. Rep. No. 1505, 70th Cong., 2d Sess. 1 (1929). The bill was reported to the Senate floor in this amended form, but it failed to win approval. 70 Cong. Rec. 2981 (1929).

Legislation to prohibit escapes was again introduced in the House in the following year. The new proposal was based upon the earlier House bill and entirely omitted the Senate amendment concerning intent. H.R. 7832, 71st Cong., 2d Sess. § 9 (1930). See H.R. Rep. No. 106, 71st Cong., 2d Sess. 3 (1930); S. Rep. No. 533, 71st Cong., 2d Sess. 3 (1930). It broadly punished "[a]ny person * * * who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom * * *." This version, from which 18 U.S.C. 751 is derived, was subsequently adopted by both houses without debate and enacted into law. Act of May 14, 1930, ch. 274, Section 9, 46 Stat. 327. See *Federal Prisoners and Penitentiaries: Hearings on H.R. 7832 Before the House Comm. on the Judiciary*, 71st Cong., 2d Sess. 29 (1929); 72 Cong. Rec. 989, 1138, 2157-2158, 2179-2180, 7691, 8575-8576, 8705 (1930).

The legislative history thus indicates that Congress was presented with a proposal to adopt an escape statute containing a stricter intent requirement than that imposed by the common law. While the Senate Judiciary Committee amendment is not free of ambiguity, it unquestionably would have required proof of more than a mere knowing and voluntary departure from confinement, or else the added language would have been surplusage. Congress rejected this amendment, however, and instead enacted legislation that outlawed all "escapes" without addressing the mental element required. This decision strongly suggests that Congress desired to retain the common law formulation of the crime. See also note 39, *supra*.

3. The lower federal courts have consistently construed the escape statute to require only a general intent to depart from the boundaries of lawful custody. No court, until the decision in this case, has even intimated that the defendant's motivation is an element of the crime under Section 751(a). See *United States* v. *Jones*, 569 F.2d 499, 500, 501 n.3 (9th Cir.), cert. denied, 436 U.S. 908 (1978); *United States* v. *Cluck*, *supra*, 542 F.2d at 731 n.2; *United States* v. *McCray*, 468 F.2d 446, 448 (10th Cir. 1972); *United States* v. *Woodring*, *supra*, 464 F.2d at 1251; *United States* v. *Chapman*, *supra*, 455 F.2d

at 749; *Chandler* v. *United States*, *supra*, 378 F.2d at 908.

Against all of this, the sole support offered by the court of appeals for the proposition that escape is a "specific intent" offense is *United States* v. *Nix*, 501 F.2d 516 (7th Cir. 1974). *Nix* involved two defendants, Nix and Peterson, who were inmates in the United States Penitentiary at Marion, Illinois. Peterson was charged with escape from the prison, while Nix was charged with attempted escape. Each defendant claimed that he was "roaring drunk" at the time of the offense. Since all attempt crimes require proof of a "specific intent" (see 1 W. Burdick, *supra*, § 139 at 180), Nix claimed that he was entitled to an instruction that the intent element of the crime could be negated by his intoxication. Peterson argued that escape should also be considered a "specific intent" offense and that he was therefore entitled to an intoxication instruction as well.

The Seventh Circuit acknowledged that there was scarce authority for Peterson's "specific intent" argument (501 F.2d at 517), but it concluded that "[w]henever intoxication * * * is raised as a mitigating factor, use of the 'specific' and 'general' intent labels interferes with the crucial analysis a court should make in escape cases: what constitutes the 'escape' element of the crime?" (*id.* at 518). The court said that escape required proof of some mental element and defined the element as "an intent to avoid confinement." It then stated that, "[w]hatever label is placed on this intent, a defendant under

§ 751 is entitled to an instruction that includes this mental component as an element of the crime * * *. If the defendant offers evidence that he was intoxicated at the time of the offense, the jury must be instructed to consider whether he was so intoxicated he could not form an intent to escape" (*id.* at 519-520; footnote omitted).

Contrary to the court of appeals' contention in this case, *Nix* thus held only that intoxication is a defense to escape under Section 751 regardless of whether the offense requires proof of a "general" or "specific" intent.[40] Like Judge Wilkey (Pet. App. 80a), we have little quarrel with this ruling, since proof that a defendant left the prison while intoxicated would fail

---

[40] Judge Pell's dissenting opinion in *Nix* confirms that the court's focus was on the availability of the intoxication defense in escape cases rather than on whether escape is a "general" or "specific" intent crime (501 F.2d at 520):

> The only close aspect that I find in this case is that part of the court's instructions to the effect that if the defendant acted or failed to act because of intoxication it was not a defense. I do not quarrel, nor do I understand that the majority does, with the immediately preceding statement in the charge that the crime does not involve specific intent. I would accept the majority standard that escape is a voluntary departure from custody with an intent to avoid confinement.

At one point in the *Nix* opinion (*id.* at 518), the court of appeals stated that its reasoning would be equally applicable if a defendant raised "coercion or mistake," rather than intoxication, as a defense to escape. This assertion, which was of course unnecessary to the court's decision, was not otherwise explained. We believe that the statement is incorrect for the reasons stated below (see pages 62-64, *infra*).

to satisfy the mens rea element of the offense. See W. LaFave & A. Scott, *supra*, § 45 at 343-344. Indeed, the "intent to avoid confinement" that the Seventh Circuit held must be shown in escape cases would appear to be only a "general intent" requirement, since that mental element, one supposes, would be conclusively proven in every case by evidence that an inmate knowingly left the physical confines of the prison without permission. Nothing in the phrase suggests that an inmate must have acted with any ultimate motive or purpose in leaving custody, much less lends any support to the court of appeals' holding that the escape statute requires the government to prove a "specific intent" to escape from "normal" conditions of confinement (Pet. App. 9a n.17). See *United States* v. *Spletzer*, *supra*, 535 F.2d at 953-954.

4. It follows from the conclusion that escape is a "general intent" crime that the evidence respondents introduced to explain why they left the District of Columbia Jail was irrelevant to the issue of intent. The criminal law recognizes two types of defenses. One kind "negative[s] guilt by cancelling out the existence of some required element of the crime," either the actus reus or the intent element. W. LaFave & A. Scott, *supra*, § 8 at 46-47. Mistake of fact, insanity, and (as the court held in *Nix*) intoxication, for example, are defenses designed to establish that the accused did not have the mental state required to commit the offense. However, certain other defenses, such as self-defense, operate on an entirely

different principle. They "do not negative any of the elements of the crime but instead go to show some matter of justification or excuse which is a bar to the imposition of criminal liability." *Id.* at 47.

Defenses based on coercion or "choice of evils" have always been viewed as among the latter type, because they do not entail an absence of mens rea and hence do not negate a general criminal intent. "When a person commits a crime under compulsion, although his choices are limited, he still has the requisite intent to commit the criminal act." 43 U. Cin. L. Rev. at 961 n.31. As noted above (see pages 21-23, *supra*), the rationale for defenses such as duress or necessity is not that the defendant, confronted with imminent, serious harm, does not "intend" to do what he does, but rather that, although he has the mental state that the crime requires, he has made the most socially useful choice and should be excused from criminal responsibility. See W. LaFave & A. Scott, *supra*, § 49 at 374, § 50 at 382. In such a situation, "the accused has intended the criminal act, under any usual meaning of the word 'intention.' * * * The fact that the accused does not really desire the consequences for their own sake, but does desire them as a means of escape from imminent peril, is not relevant to this point, as desire is not a necessary part of intention." Wasik, *Duress and Criminal Responsibility*, 1977 Crim. L. Rev. 453, 455.[41] Thus, as

---

[41] If the rule were otherwise—that is, if duress operated to negate criminal intent—it would be difficult to explain many of the traditional limitations on the "choice of evils"

Judge Wilkey pointed out (Pet. App. 75a; emphasis deleted):

> [I]f a prisoner leaves prison to visit his dying mother with the intent to return to prison, he has nevertheless "intended" to depart prison and he is therefore guilty of escape; it was still his purpose to avoid confinement, if only for a brief time. Similarly, if a prisoner is forced to leave prison at gunpoint, his "intent" is not negated. It was still his purpose to depart from custody; he may not have desired to leave, but he still intended to.

By the same token, the evidence of fires, threats and assaults offered by respondents, while perhaps accounting for their decision to flee from custody, could not negate their general intent to avoid confinement. There is no doubt that respondents consciously and deliberately left the District of Columbia Jail and that they were aware of the nature of their

---

defense, such as the inapplicability of the defense to the charge of murder. See W. LaFave & A. Scott, *supra*, § 49 at 374 n.3; Pet. App. 83a n.92 (Wilkey, J., dissenting). The only authority cited by the court of appeals for its assertion that duress, "like the defenses of intoxication, insanity, and mistake, negates the intent * * * element[] of an offense," is the table of contents of the draft *Model Penal Code* (Pet. App. 17a-18a & n.31). Nowhere in the commentary of the Code, however, is it suggested that compulsion exculpates through the negation of intent. More important, the Code labels "duress" as an "affirmative defense" (*Model Penal Code* § 2.09 (Proposed Official Draft, 1962), whereas it states that defenses such as mistake (*id.* at § 2.04) and intoxication (*id.* at § 2.08) operate to negate the mental element of the offense.

actions. The court of appeals did not dispute this and, indeed, respondents have never contended otherwise. This, as we have shown, is all that is required to establish the intent element of the escape offense under 18 U.S.C. 751(a). Accordingly, even assuming that respondents' evidence of harsh prison conditions tended to show overwhelming compulsion, it still could not have served to prove that they acted without mens rea. The district court therefore correctly refused to allow the jury to consider the evidence for its bearing on respondents' intent to escape.[42]

---

[42] For much the same reasons, there is no substance to the court of appeals' suggestion that the evidence of threats and fires was relevant to the "voluntariness" of respondents' actions (Pet. App. 10a, 17a). The requirement of "voluntariness" means that the actus reus was the product of the defendant's free will. See, *e.g.*, *Model Penal Code* § 2.01 (Tent. Draft No. 4, 1955); R. Perkins, *supra*, at 749; 1 W. Burdick, *supra*, §§ 198-199 at 260-262. Issues of voluntariness must be raised within the framework of the defense of duress, which has been fashioned precisely for dealing with the issue of free will. See Newman & Weitzer, *supra*, 30 S. Cal. L. Rev. at 313-314. "[T]he positive law that defines where free will ends and exculpating compulsion begins is embodied in the duress defense and *no where else*" (Pet. App. 69a; Wilkey, J., dissenting). Thus, if, as we contend, respondents' evidence of improper conditions at the District of Columbia Jail was insufficient as a matter of law to establish a choice-of-evils defense, the trial judge was not obliged nonetheless to allow the jury to consider the evidence on the issue of "voluntariness." Judge Wilkey has persuasively exposed the dangers of the standardless approach advocated by the court majority. See *id.* at 70a-73a & n.68.

B. The Court of Appeals' Holding That The Federal Escape Statute Requires Proof of a "Specific Intent" to Avoid "Normal" Aspects of Confinement Will Cause Significant Problems in Escape Cases

In the court of appeals' view, the "intent to avoid confinement" required under 18 U.S.C. 751(a) is not the general intent to go beyond permitted limits, as the district court charged the jury, but rather must be defined by reference to the nature of prison conditions (Pet. App. 9a n.17):

> The word "confinement" describes the most common form of punishment prescribed by our legal system. Jurors are readily aware that a person serving a sentence for a crime is "confined"—*i.e.*, his liberty is restricted—in certain fundamental ways. For example, he cannot leave the institution wherein he is confined, he cannot come and go as he pleases, his daily schedule is subject to various controls, his privacy is substantially curtailed, and he is subject to strict discipline. * * * [I]f a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied.

Hence, said the court, when a defendant introduces evidence that he was subject to such "non-confinement" conditions, "the crucial factual determination on the intent issue is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant also intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement" (*ibid.*).

This holding contains the seeds of substantial mischief. It permits the introduction of evidence tending to demonstrate harsh and improper confinement conditions and permits exculpation on the basis of lack of "specific intent" to escape whenever the jury finds that such conditions are not "normal" aspects of confinement and that the unauthorized departure was prompted by them. By thus confusing coercion with lack of intent, the court has eliminated any need for an escape defendant to demonstrate that the circumstances that compelled his departure constituted an imminent and substantial threat to his life or health, that legitimate alternatives to the escape were unavailable or unavailing, or that his unlawful activity ceased at the earliest possible moment through surrender to proper authority.

The initial problem with the court of appeals' opinion is that it is totally devoid of standards to assist the jury in distinguishing between "normal" confinement conditions, which presumably must be stoically endured, and those that are "abnormal," which may lawfully be avoided by departure from custody because they somehow are sufficient to negate the intent to escape. The legitimacy of prison practices is often a difficult question for lawyers and

judges to agree upon (see, *e.g.*, *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 40-41), let alone for laymen. The lack of standards invites in virtually every escape prosecution the introduction of evidence of every conceivable unpleasantry that may exist within the prison. As a result, it is reasonable to forecast that escape trials will become wide-ranging investigations into the acceptability or normality of prison conditions, rather than a means of enforcing lawfully imposed criminal sentences. The defendant's opportunity to divert the focus of the jury's attention from the question of his culpabiilty to that of the penal system's adequacy will obfuscate what should be the central issue at such a trial.

The very ambiguity created under the court of appeals' analysis also will increase the already powerful incentives for prisoners to attempt to escape. As noted above, the court's ruling frees inmates from having to satisfy the stringent objective criteria that have heretofore minimized the availability of the duress defense in escape cases. Given the presence of arguably intolerable conditions in any prison environment, every sophisticated inmate captured after an escape will defend by claiming that these "non-confinement" conditions led to his departure.[43] Even

[43] This problem is exacerbated by the court of appeals' holding that, once the defendant presents evidence of severe confinement conditions and claims that they induced his flight, it becomes the government's burden to establish beyond a reasonable doubt that the escape was instead motivated by a desire to avoid "normal" aspects of confinement. Of course, as Judge Wilkey pointed out (Pet. App. 89a), "even though a prisoner's primary or sole purpose is to avoid 'non-confinement conditions,' he can only do so—and he knows he can only do so—by avoiding legitimate confinement conditions as well." The majority did not disagree with this observation, for indeed it is unanswerable. The court's test thus must contemplate that the government cannot meet its burden merely by showing that the defendant knowingly departed from lawful custody. It instead will require the prosecutor to disprove the defendant's own testimony concerning his motivations for escaping, a task not easily accomplished, or to establish that the conditions allegedly prompting the departure did not fall below the court's undefined minimal standards. (Indeed, since it is the defendant's "intent"—that is, his *belief* that conditions are abnormal—that eliminates criminal liability under the majority's view, it might not be sufficient merely to show that conditions in a prison are legitimate. The government might be forced to prove that the defendant did not believe they were illegitimate.)

if the defense proves unsuccessful, the increased number of escapes will mean an increased level of tension within the prison system, an increased disruption of prison discipline, and an increased danger of injury to correctional personnel and the public. See *United States* v. *Brown*, *supra*, 333 U.S. at 21 n.5; Note, *supra*, 54 Chi.-Kent L. Rev. at 939-940.[44]

Moreover, the court of appeals' "specific intent" requirement will allow juries an essentially unfettered discretion to decide what confinement conditions

[44] It is for these reasons that the courts have heretofore consistently held that prison conditions alone cannot excuse or justify an escape. See, *e.g.*, *Dempsey* v. *United States*, 283 F.2d 934 (5th Cir. 1960); *State* v. *King*, 372 S.W.2d 857, 859 (Mo. 1963); *State* v. *Palmer*, 45 Del. 308, 72 A.2d 442 (1950); *People* v. *Whipple*, 100 Cal. App. 261, 279 P. 1008 (1927); 37 Mo. L. Rev. at 555; Annot., *supra*, 69 A.L.R. 3d at 689-692.

are sufficiently inadequate to warrant escape. After the wide range of evidence permitted by the court's opinion has been received (Pet. App. 15a; footnote omitted),

> the proper approach is to inform the jury of those considerations that are relevant to its deliberations, not to take the issue out of its hands. In our view allowing the jury to perform its accustomed role in escape cases may make those responsible for prison conditions more conscious of their responsibilities and may well lead to fewer, rather than more, escapes.

In other words, under the guise of allowing the jury to perform its "accustomed role in escape cases," a phrase the court does not otherwise elaborate upon, juries would be empowered to dictate to prison administrators the conditions of confinement that are "normal" and appropriate and that must be maintained to make escape unlawful.[45] The effect of an acquittal would be an unreviewable determination that the conditions in a particular institution are so oppressive that they justified the departure, not only of the defendant, but also (one would suppose) of all other inmates in the institution as well. See Gardner,

[45] The majority's assumption that its reformulation of the escape offense will act as a spur to penal reform is fanciful. Even assuming that escape prosecutions, rather than civil injunctive or damage actions, are a proper means of improving prison conditions, prison officials often will have no way of knowing after an acquittal what the jury found to be the "non-confinement" condition that justified the escape.

supra, 49 S. Cal. L. Rev. at 139-149. It goes without saying that this result is unacceptable.[46]

Federal prisoners have at their disposal an inmate grievance procedure through which they may inform correctional authorities of their complaints about prison conditions and may secure complete remedial action. See page 36, note 23, *supra*. In addition, when administrative procedures prove ineffective, "persons in prison * * * have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'" *Cruz* v. *Beto*, 405 U.S. 319, 321 (1972), citing *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969). We submit that these established and orderly methods of dispute resolution, not the self-help remedy of escape sanctioned by the court of appeals, should be the ex-

[46] The result is also at odds with this Court's frequent admonition that the courts must accord great deference to the professional judgments of prison administrators in assessing the propriety of conditions of confinement. See *Bell* v. *Wolfish*, *supra*, slip op. 19 n.23, 40-41; *Jones* v. *North Carolina Prisoners' Labor Union*, *supra*, 433 U.S. at 126. Indeed, the consequences of the court of appeals' opinion are even more drastic than they might seem at first blush. Correctional officials can alter formal confinement conditions if a jury finds that they warrant escape. But the court below would also allow an inmate to offer a "specific intent" defense to an escape charge where, as in this case, the harsh conditions were at least in part caused *by other inmates*. Most prison escape cases have involved claims of threats or force by fellow prisoners rather than institutional dangers caused by the decisions of correctional officials.

clusive avenue for the relief of whatever improper conditions exist within our nation's penal institutions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

KENNETH S. GELLER
Assistant to the Solicitor General

JEROME M. FEIT
JOHN F. DEPUE
Attorneys

JUNE 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 295140 8